IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1105 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DAHYABHAI KALUBHAI SOLANKI - Appellant
Versus
MILAN INTERMEDIATES PVT.LTD. & 3 – Respondents

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Appearance :
MR KP SHAH for Appellant : 1,
MR YATIN SONI for Respondents : 1 - 3.
MR MA PATEL ADDL PUBLIC PROSECUTOR for Respondent : 4,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 09/11/2006

ORAL JUDGMENT

1. The Gujarat Water Pollution Control Board through Dahyabhai Kalubhai Solanki, Assistant Law Officer, has preferred this Appeal under

Section 378 of the Code of Criminal Procedure, 1973 (herein after referred to as 'the Code' for the sake of brevity) challenging the order of acquittal passed by the learned Chief Metropolitan Magistrate, Ahmedabad in Criminal Case No. 54 of 1993 on 12.2.1997, acquitting the present respondents – original accused of the offences punishable under Section 43 and 44 of The Water (Prevention and Control of Pollution) Act, 1974 (herein after referred to as 'the Pollution Act' for the sake of brevity).

2. This Court (Coram: N.N. Mathur, J.) on 18.11.1997 granted special leave to appeal and admitted the Appeal. The same has been listed for final disposal today.

3. The facts in brief leading to filing this Appeal deserves to be set out as under.

4. One Smt. D.P. Shah, Assistant Environment Engineer along with one Shri A.B. Shah, Assistant, had visited the factory premises of accused No. 1, wherein, accused Nos. 2 and 3 were shown to be the Directors of accused No. 1 factory. The factory was inspected by said Smt. Shah along with one Shri Shah, Assistant and employee of the Board on 22.5.1992. At the time of inspection of the factory, the accused No. 2 Rohitbhai Shah was present in the factory premises. The production of H.Acid was in

progress in the factory. The witness No. 2 i.e. Diptiben Shah issued notice of entry and inspection to said Shri Rohitbhai Shah and obtained his signature on the office copy. As it is stated herein above, Ms. Shah was accompanied by Shri Shah, Jr. Scientific Assistant. The said notice was produced at Ex. 14. The effluents was being discharged in the GIDC drainage. The same was required to be discharged in accordance with the parameters. The effluents which was being discharged in GIDC drainage was passing through the plant of the Company. It was noticed that naphthalene HCL, Soda Ash etc. has been used as raw-material for producing H.Acid. The notice for collecting the sample out of the effluents being discharged of the Company was also given to said Shri Rohitbhai – accused No. 2. Copy whereof is produced at Ex. 15. Rough sketch of the premises was prepared wherefrom the effluents was collected. That rough sketch of the premises is produced at Ex.16. The plastic bucket was used for collecting the effluents. The respondent No. 2 was requested to intimate his wish as to whether sample effluents collected was to be divided into two parts as provided under the law. Shri Shah said that no such requirement was warranted and therefore, he gave his consent in writing that effluents was not required to be divided into two parts. The said writing is produced at Ex.17. Thereafter, collected sample of effluents was transferred

into one plastic cane. The necessary tag containing address of the factory, date and time of collecting the sample, etc. was prepared and the same was attached to the plastic cane. The said tag was counter signed by accused No. 2 – Rohitbhai. Said tag is produced at Ex.18. The report of inspection was thereafter prepared and the same was counter signed by Rohitbhai – accused No. 2. The cane was placed into ice box and it was handed over to Shri Dave, Senior Scientific Officer. The counter receipt of the cane is produced at Ex. 21. As the sample effluent discharged was not found in conformity with the standards prescribed and as it was containing more pollutant than the parameters, the complaint was required to be filed as there was a breach of provisions of Sections 24 and 25 punishable under Section 43 and 44 of the Pollution Act. Accordingly, the authorized Officer of the Board i.e. Shri Solanki, Assistant Law Officer lodged complaint, which came to be registered as Criminal Case No. 54 of 1993. After recording plea of denial on the part of the accused, the trial commenced. After recording the evidence, the accused were called upon to make the further statement, wherein they denied the case of the prosecution. After analyzing the evidence on record, the trial Court has recorded the finding of acquittal vide its order dated 12.2.1997 acquitting the accused of the charges punishable under Sections 43 and

44 of the Pollution Act. Being aggrieved and dissatisfied with the said order, the appellant has preferred the present appeal.

5. When the matter was called out, none has remained present for the appellant. This matter is very old and it is awaiting its final disposal and hence it was required to be disposed off.

6. The appellant has enlisted grounds for Appeal in the memo of Appeal, wherein, it is contended that the order of acquittal being erroneous in law, the same deserves to be quashed and set aside. It is also contended that the trial Court has erred in holding that the prosecution has failed in establishing that the accused Nos. 2 and 3 were concerned and connected with the offence. The trial Court has failed in appreciating that the accused No. 2 was in fact present in the premises of the factory. It is contended that in view of these grounds, the order of acquittal passed by the trial Court deserves to be quashed and set aside.

7. Shri Soni, learned counsel appearing for the respondent Nos. 1 to 3 has contended that this being an Appeal against the order of acquittal, unless and until it is amply demonstrated by the appellant that the reasoning and finding for acquitting the respondents accused are patently

perverse and resulting into miscarriage of justice, no interference is called for. The respondents have right to advance all the contentions available under law independent of the reasoning adopted by the trial Court in support of the acquittal. Shri Soni has also contended that the very procedure prescribed for collecting the sample has not been scrupulously complied with by the witness No. 2, an Officer of the Board responsible for collecting the sample. The effluents ought to have been collected in presence of independent witness. The record shows that effluents was collected in absence of panch witness and the prosecution witness No. 2 collecting the sample has not cared to keep any independent panch present nor has she cared to draw the panchnama while collecting the sample. In absence of the panchnama and panch witness, the prosecution cannot be said to have proved their case beyond reasonable doubt. In the alternatively, without prejudice to his aforesaid contention, Shri Soni has further submitted that in view of the decision of this Court in case of ***DAHYABHAI KALUBHAI SOLANKI VS. DEVINE INTERMEDIATES & CHEMICALS & ORS.*** reported in 1996(1) Gujarat Law Reporter p.729, when the compliance with mandatory provisions of Rules is not established beyond doubt by the prosecution, than, the accused cannot be visited with the criminal liability, and therefore, on this count also,

the order of acquittal deserves to be sustained.

8. This Court has perused the record and proceedings and the judgment of the trial Court impugned in the present appeal.

9. Shri Soni has also submitted that the trial Court has infact acquitted the accused also on the ground that necessary sanction was not proper for lodging the prosecution against the accused and therefore, on this count also, the order of acquittal deserves to be sustained.

10. This appeal deserves to be dismissed on the sole ground that Section 49 of the Act provides as to how the cognizance of any offence is taken by the Court. Section 49 of the Act deserves to be set out as under :-

> “Section 49 : Cognizance of offences : (1) No court shall take cognizance of any offence under this Act except on a complaint made by -
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> (a) a Board or any officer authorised in this behalf by it; or
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> (b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Board or officer authorised as aforesaid,
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> and no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first Class shall try any offence punishable under this Act].

2. Where a complaint has been made under Clause(b) of sub-section (1), the Board shall, on demand by such person, make available the relevant reports in its possession to that person:

Provided that the Board may refuse to make any such report available to such person if the same is, in its opinion, against the public interest.]

3. Notwithstanding anything contained in section [29 of the Code of Criminal Procedure, 1973 (2 of 1974)], it shall be lawful for any [Judicial Magistrate of the First Class or for any Metropolitan Magistrate] to pass a sentence of imprisonment for a term exceeding two years or of fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act."

11. This Court (Coram: D.C. Srivastava, J.) in its unreported judgment in case of ***M/s. Nicosulf Industries & Exports Pvt. Ltd. Vs. State of Gujarat*** decided on 8.8.2006 in Criminal Appeal No. 241 of 2001 in terms has observed that the authorisation for lodging the complaint as envisaged under Section 49 of the Act is only by the Board and any authorisation made by the Chairman was not a proper authorisation so as to sustain the prosecution and its validity. In

that case also, the Board had placed reliance upon the Resolution dated 27th March, 1984, which has been reproduced by the Court in its decision. The delegation itself will not give power to the board to sanction prosecution in respect of offences committed under the provisions of Water Prevention and Control Act, 1974 and Rules made thereunder. This resolution and its tenor has been discussed in the case of M/s. Nicosulf (Supra) and it was observed that in absence of any document, the complaint filed by someone else under the authorisation by Chairman would not be competent and valid.

In the instant case also, the very Resolution of the Board dated 27.3.1984 appears to have been relied upon showing the powers of Chairman for sanctioning the prosecution as it is stated hereinabove. This Resolution has found to be not sufficient enough to enable the Assistant Law Officer to file complaint in respect of the offences committed under the Act. This being a binding judgment of this Court, the decision of acquittal deserves to be sustained. It deserves to be noted that in the instant case, the complaint was filed by the Assistant Law Officer Shri D.K. Solanki, who had been authorised to file the complaint by the Chairman but the Chairman himself has been authorized to sanction the prosecution vide resolution of the Board dated 27.3.1984. Now as it is stated

hereinabove, this is the very resolution, which was under challenge before this Court in case of M/s. Nicosulf (Supra). In view of this and couple with the fact that there is a finding with regard to non-compliance with mandatory provisions in respect of the Act in respect of collecting the sample, this Court is of the considered view that the order of acquittal does not call for any interference.

12. In the result, the appeal is required to be dismissed and accordingly, the same is dismissed.

(S.R.BRAHMBHATT, J.)

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